Supreme Court, U.S.
FILED
FEB 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-766

In The
Supreme Court Of The United States

OCTOBER TERM, 1985

JULIA H. TASHJIAN,
Secretary of the State of Connecticut,
Appellant,

v.

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON AND THOMAS J. D'AMORE, JR.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR APPELLANT

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QUESTIONS PRESENTED

Where the state creates, regulates, and with its towns finances state primaries, and also grants automatic and preferential access on the general election ballot to the primary winners,

1. Does a state statute which requires only that a person belong to a political party in order to vote in that primary violate the First Amendment of the U.S. Constitution solely because a party adopts a conflicting rule?

2. Does a party rule which provides, contrary to state law, that unaffiliated persons may vote in some, but not all, state primaries undermine

the State's responsibility to set voter qualifications and regulate elections under Art. I, §§ 2 and 4, and the Tenth and Seventeenth Amendments of the U.S. Constitution?

3. Does the party rule also violate Art. I, § 2, and the Seventeenth Amendment because it discriminates in voter qualifications for Congressional elections as compared to those for the State Legislature?

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In the Supreme Court of the United States
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No. 85-766

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v.

REPUBLICAN PARTY of the STATE of CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the Court of Appeals, J.S. App. 1-141,* is reported at 770 F.2d 265 (1985). The original opinion of the District Court is at J.S. App. 142-213. An edited version is reported at 599 F.Supp. 1228 (1984).

JURISDICTION

This is an appeal from a decision of the U.S. Court of Appeals for the Second

* Hereafter, J.S. App. is used to refer to the separately bound appendices filed with the Jurisdictional Statement. J.A. refers to the Joint Appendix submitted with this brief.

Circuit holding invalid under the U.S. Constitution § 9-431, Conn. Gen. Stats., relied on by the appellant, which provides that one must belong to a political party to vote in that party's primary elections.

Federal jurisdiction is based on 28 U.S.C. §§ 1331, 1343(a)(3) and 1343(a)(4). Judgment was entered Aug. 8, 1985. J.S. App. 214-16. A notice of appeal to this Court was filed in the Court of Appeals Sept. 20, 1985. J.S. App. 217-21. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(2).

The jurisdictional statement was filed November 4, 1985. Probable jurisdiction was noted January 13, 1986.

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves Art. I, §§ 2 and 4, the First, Tenth and Seventeenth Amendments to the Constitution, § 9-431, Conn. Gen. Stats., and other provisions of Ch. 153, Parts I, II and III A., Conn. Gen. Stats., set forth in J.S. App. 222-38.

STATEMENT OF THE CASE

Conn. Gen. Stats. § 9-431 requires that persons be members of a political party to vote in that party's primary election. The plaintiffs, however, rely on a party rule which would, contrary to statute, allow unaffiliated voters to vote in Republican primaries for United States Senators, United States

Representatives, Governor and certain executive officers elected on a statewide basis. It would not apply to any other elected offices in the State, including the State Senate and House.

The rule is that of a state, rather than a national, party convention. It deals with state and local primaries and not presidential ones. J.S. App. 251-2.

In 1955, the Connecticut General Assembly, with bipartisan support, enacted a challenge primary law. § 9-400 Conn. Gen. Stats. That law allows a candidate who obtains 20% or more of the convention vote to wage a primary for the nomination.

The legislation involved in this case was passed after extensive debate, with the Assembly aware of the various methods for primary elections. See 6 Conn. Sen. Proc., Pt. 11, Nov. 1955 Sp. Sess., p. 542. The legislature chose the primary system that it believed would best preserve political party integrity and responsibility. Id. at pp. 458, 542.

Connecticut law provides for automatic and preferential ballot access for major parties. SS 9-379, 9-249a, Conn. Gen. Stats. The primary is financed by public funds. See, e.g., SS 9-436, 9-441, Conn. Gen. Stats. Party enrollment is accomplished simply by completion of a short form up to one day

before the primary. Conn. Gen. Stats. § 9-56; Conn. P.A. 84-118.

In 1976, the same law invalidated by the Court of Appeals was upheld in Nader v. Schaffer, 417 F.Supp. 837 (D.Conn. 1976, three- judge court), aff'd mem., 429 U.S. 989 (1976).

The District Court (D. Conn.) denied the defendant's motion to dismiss and granted summary judgment for the plaintiffs Dec. 5, 1984. J.S. App. 197. The Court of Appeals affirmed the judgment Aug. 8, 1985. J.S. App. 214-16 130-31.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals subjects state laws regarding election administration to the acquiescence or veto of a political party, notwithstanding legitimate state interests to the contrary. Under the holding and logic of that opinion, many election codes of the states -- including primary laws -- could be invalidated any time a political party adopts an inconsistent rule. The Court of Appeals itself acknowledged that this case has "far-reaching implications... for primary elections in particular and the two-party system in general...." J.S. App. 33-4 n.10.

A major flaw in the Court's opinion is that it ignores the public electoral function of major political party nominations. In reality, political parties virtually monopolize American elections. Party nominees, in turn, dominate government. The Court, however, treats those nominations as just another private affair.

The opinion of the Second Circuit conflicts with this Court's affirmance in Nader, supra, which upheld the very law that has now been struck down. The decision also improperly extends Democratic Party of the United States v. Wisconsin, 450 U.S. 107 (1981), which involved an attempt by a state to

regulate a national party convention. That case did not involv -- or ever question -- the authority of a state to regulate its own state-financed primary elections.[1/]

Moreover, the Court of Appeals grossly misapplies Roberts v. United States Jaycees, ____U.S.____, 104 S.Ct. 3244 (1984), to reach its remarkable conclusion that a major political party resembles an intimate human relationship.

1/ See dissent from the dismissal of appeals in Bellotti v. Connolly, et al., ____U.S.____, 103 S.Ct. 1510 (1983), (Stevens,J., joined by Rehnquist, J., and O'Connor, J.), contrasting state regulation of a nation-wide contest with state regulation of elections for state-wide office.

This unprecedented conception of political associational rights must be set aside "if some sort of order, rather than chaos, is to accompany the democratic processes." Storer v. Brown, 415 U.S. 724, 730 (1974).

For example, under plaintiffs' rule voting qualifications would differ from party to party and office to office, creating unreasonable administrative burden, errors and expense, as well as voter confusion.

Furthermore, and critically, the Court employed a severe standard of review which preordains the unconstitutionality of many state election laws. The Court's opinion also

substantially narrows the voting rights protections afforded by Art. I, §§ 2 and 4, of the Constitution.

The issue in this case is not whether open or closed primaries better promote the goals of effective, responsible and democratic government in a state; that decision was made, as it must be, by Connecticut's popularly elected state officials. The issue, instead, is whether the States may continue to regulate primary elections under the Constitution, or whether those laws will now be subject to the constantly shifting sands of political conventions.

ARGUMENT

I. A State Law Regulating State Primaries Does Not Violate Associational Rights Simply Because A Political Party Adopts A Conflicting Rule.

A. Primaries Of Major Parties Are So Closely Related To The General Election That The Choice Of A Primary System Is A Very Significant One For The State.

In his classic work on American government, James Bryce stated that "[i]n "America the great moving forces are the parties." 2 J. Bryce, The American Commonwealth 5 (1924). The power of the major political parties, therefore, is of very legitimate public and State concern.

It is common knowledge that the major political parties dominate if not

monopolize the electoral process. Their nominees will usually exercise sovereign power. Primaries and nominating conventions are "closely related to the final election and their proper regulation [is] ... essential to effective regulation of the latter, so vital to representative government...." Newberry v. United States, 256 U.S. 232, 285 (1921) (Pitney, J., concurring part, joined by Brandeis, J. and Clarke, J.).

> So strong with the great majority of voters are party associations, so potent the party slogan, so effective the party organization, that the likelihood of a candidate succeeding in an election without a party nomination is practically negligible.... As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made.

Id. at 286.

The Court in United States v. Classic, 313 U.S. 299 (1941), recognized that "the practical influence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election...." Id. at 319.

The Classic decision noted that the primary was conducted at public expense and largely regulated by the State. Id. at 311. This is also true in Connecticut. See ch. 153, Parts I, II and III A, Conn. Gen. Stats. The Court held that the primary was really a step in the overall election process under Art. I, S 2, "[w]here the state law has

made the primary an integral part of the procedure of choice or where in fact the primary effectively controls the choice...." Id. at 318 (emphasis added).

This was true whether or not the primary determined the election outcome and regardless of whether racial discrimination was present. Id. at 323. Furthermore, voter qualifications were to be determined by state law subject to Art. I, SS 2 and 4, and the States in passing those laws exercised "wide discretion". Id. at 310, 311.

Subsequently, in Smith v. Allwright, 321 U.S. 649, 660 (1944), the Court noted that although primary elections were conducted by the party, this was done

under state statutory authority. Id. at 663.

> The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party.

Id.

The State, by placing the primary winners on its official election ballot, enforced the party practice. The Court concluded:

> The privilege of membership in a party may be, as this Court said in Grovey v. Townsend, 295 U.S. 45, 55, no concern of a State. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the State makes the action of the party the action of the State.

Id. at 664-665. (emphasis added) 2/

2/ "[T]he state delegates to the political party the decidedly

(footnote cont'd)

See also Storer v. Brown, 417 U.S. 724, 735 (1974); Lubin v. Pannish, 415 U.S. 709, 715 (1974).

Furthermore, the Second Circuit itself has ruled that a party's

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(footnote cont'd from previous page)

> governmental function of determining who may gain a place on the ballot ... it thus seems clear that the actions of a political party integrally involved in the selection of a candidate for public office should be treated as state action where the state incorporates the party's choice by conferring some political benefit, such as preferential ballot access, upon the candidate." L. Tribe, American Constitutional Law, § 13-23, p. 790. "This delegation and adoption by the state provides the proper basis for finding state involvement in party procedures...." Developments in the Law-Elections, 88 Harv. L. Rev. 1111, 1160 (1975).

nomination for government office is a "public electoral function" and not a private affair.[3/]

The three-judge court in Nader v. Schaffer, supra 417 F. Sup. 837, which upheld the same law that was struck down in this case, recognized that because of the electoral success of the two major parties, their nominations are "so important to the ultimate selection of government leaders." Id. at 843. These nominations are regulated in detail

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3/ Seergy v. Kings County Republican County Committee, 459 F.2d 308, 313-15 (2d Cir. 1972); see also Montano v. Lefkowitz, 575 F.2d 378, 383-84 n. 7 (2d Cir. 1978); Mrazek v. Suffolk County Bd. of Elections, 630 F.2d 890, 894 (2d Cir. 1980).

because "the State is particularly concerned with the parties which have demonstrated some probability of success in the general election and whose candidates may become holders of public office." Id. When the usefulness of the party is seriously impaired, "[i]n the end, the chief loser would be the public." Rosario v. Rockefeller, 458 F.2d 649, 652 (2d Cir. 1973), aff'd, 410 U.S. 752 (1973). See also V.O. Key, Politics, Parties and Pressure Groups 9, 283 (5th 1964); W. Wilson, Constitutional Government In The United States 204-07 (1908); J. Burns, The Power To Lead, 214 (1984).

"The party struggle itself is concerned with the direction of public affairs. Party nominations are no more than a means to this end." Toward A More Responsible Two-Party System, 44 Am. Pol. Sci. Rev. (Supp.) 15 (1950). As one of the authors of the law involved in this case stated, "the ultimate significance of a state's party system lies in the effect it has on the making of public policy...." D. Lockard, New England State Politics 320 (1959).

In a strong two-party system, the voters may be offered a choice between party labels, each backed by a platform and record. Key, supra, at 298. When that system deteriorates, so does that choice. Id.

In fact, "[t]he internal structures of the parties within a state can have the most far-reaching implications for the kind of policy orientation of the state government...." Lockard, supra, at 324.[4/]

It follows, therefore, that the nominating process of the major parties

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4/ That study analyzed the consequences of party competition and structure on state policy in New England. The states with a healthy two-party system and effective party leadership had a more equitable tax system, better social services, stronger workmen's and unemployment compensation laws and more advanced anti-discrimination measures than did the others. Id. at 327-33. This was attributed to the pressure of state-wide elections and the need for the party to run on its legislative record. Id. at 333-334.

to the extent that it may affect party performance and responsibility is of legitimate, if not compelling, public interest. See Key, supra, at 386-95. As Bryce stated, the details of party nomination "have more significance and make more difference to the working of the government than many of the provisions of the Constitution itself." 2 Bryce, The American Commonwealth 89 (1924).

B. Each State May Choose The Primary System Including Voter Qualifications Which It Believes Will Best Further The Purposes Of Representative Government.

A State in providing for voter qualifications in primaries is "sovereign over matters not ruled by the

Constitution." Rodriquez v. Popular Democratic Party, supra, 457 U.S. 1, 8 (1982) (involving laws for filling legislative vacancies). In the absence of a clear constitutional limitation, a State "is free to structure its political system to meet its 'special concerns and political circumstances.'" Id. at 13-14. The state's electoral system is entitled to "substantial deference." Id.

When this Court upheld the Connecticut redistricting plan, it emphasized that the 14th Amendment does not require "repeated displacement of otherwise appropriate state decision making" simply to promote perfectly equal districts. Gaffney v. Cummings, 412 U.S.

735, 749 (1973). Respect must be given to "the essentially political processes of the sovereign States." Id. at 754. The plan's validity did not depend upon the consent of all political parties.[5/]

The State has comprehensive election authority which extends to primaries and voter registration and qualifications. Storer v. Brown, 415 U.S. 724, 730 (1974). "It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases...." Id. at 730.

5/ In fact, the Democratic Party had opposed the plan.

Furthermore, "'[i]n facilitating the effective operation of democratic government, a state might reasonably classify voters or candidates according to party affiliations....'" Nader v. Schaffer, supra, 417 F. Supp. at 845-46, quoting Ray v. Blair, 343 U.S. 214, 226 n. 14 (1952). "Each state legislature chooses the primary scheme that it thinks will best promote democratic, electoral and governmental goals." Nader, supra, at 843. While the State's choice of a primary system is not immune from judicial review, that review should not constitute "'some amorphous general supervision of the operations of government." Id. at 850, quoting United States v. Richardson, 418 U.S. 166, 192 (1974) (Powell, J., concurring).

A State should not be denied its choice of a primary system simply because it may not be able to please all political factions. The fundamental concern in election law is not the interest of the candidate "but rather, the interests of the voters who choose to associate together to express their support." Anderson v. Celebreeze, ____U.S. ____, 103 S. Ct. 1564, 1579 (1983). That is why primaries were provided for in the first place, to remove politics from the domination by a few. See, e.g., C. Merriam and L. Overacker, Primary Elections 5-11 (1928).

Charles Evans Hughes, when he served as President of the National Municipal

League, argued that "[t]he question then of primaries is essentially a State question. It will be solved in each State in the light of the traditions and experience of that State...." C.E. Hughes, The Fate Of The Direct Primary, 10 Nat. Mun. Rev. 23, 30-31 (1921).

C. Connecticut Has Selected The Type of Primary Which It Believes Will Best Encourage Party Responsibility and Viability.

When the three-judge court in 1976 unanimously upheld the same law involved in this case, it did not do so simply because political parties supported the statute. It recognized a legitimate State interest wholly distinct from that of the party:

> In addition to protecting the associational rights of party members, a state has a more general, but equally legitimate, interest in protecting the overall integrity of the historic electoral process. This includes preserving parties as viable and identifiable interest groups; insuring that the results of primary elections, in a broad sense, accurately reflect the voting of party members. Parties should be able to avoid primary election outcomes which will confuse or mislead the general electorate to the extent it relies on party labels as representative of certain ideologies; and preventing fraudulent and deceptive conduct which mars the nominating process. See generally Note, 27 Rutgers L.Rev. 298 (1974), and Comment, 40 U.Chi.L.Rev. 636 (1973). The Supreme Court has recognized the legitimacy of this state interest in decisions such as Rosario v. Rockefeller, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973); Storer v. Brown, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974); and American Party of Texas v. White, 415 U.S. 7678, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974).

Nader v. Schaffer, supra, 417 F.Supp. at 845.

In sustaining the requirement of 20% of the convention vote for a primary, another three-judge concluded that "[t]he state... [has] an interest in maintaining the integrity and stability of existing political parties, thus encouraging responsible action on their part." [citing the legislative history of the Connecticut primary law]. Tansley v. Grasso, 315 F.Supp. 513, 517 (D. Conn. 1970). (Clarie, J.)

When the Connecticut primary law was passed in 1955, Senator Lockard, co-chairman of the committee which reported the bill--and a professor of government and author of the political studies previously discussed--stated:

> By nature it is primarily a primary which retains the importance of the political party. We came to the decision that we could have and should have, not a wide open direct primary but rather a primary that preserved the integrity of the political party as an important function of the Govenment process as we know it in this country.

6 Conn. Sen. Proc., Pt. 11, Nov. 1955 Sp. Sess., p. 542.

One of the supporters of the law in the House, Rep. Cunningham, a Republican, noted that the bill reflected a very deliberate choice:

> Connecticut is my favorite State for a great many reasons, one of them being that it is such a fascinating combination of conservatism and progressiveness.... So it is not surprising to find Connecticut the last state in the union to adopt a primary law. As a matter of fact, this delay had certain advantages because it enabled us to benefit by the experience of the other states

> with their various types of such laws and select the type most suitable to the conditions peculiar to us.

6 Conn. House Proc., Pt. 8, Nov. 1955 Sp. Sess., pp. 457-58.

The primary law would involve rank and file voters in selecting candidates and determining policy while "at the same time maintaining party responsibility." Id. at 458. Rep. Cunningham continued: "And if you believe, as I do, that one very important factor in the success of our particular experiment in Democracy is due to the fact it functions through a strong two-party system, you will admit the necessity of party responsibility." Id.

The House Republican Majority Leader, Rep. Parsells, supporting an earlier version of that bill in a prior session, also stressed that "this type of primary recognizes party responsibility and it doesn't do away with our political parties, but it builds up their strength." 6 Conn. House Proc., Pt. 6, 1955 Reg. Sess., p. 3136. Rep. Parsells also noted:

> Thirty-four states use this type of closed-party primary; four states, including our neighboring State of Rhode Island use this type of post-convention primary. It is recommended by the National Municipal League as the most forward-looking and advanced type of primary. It was proposed by Charles Evans Hughes in 1911 and it has been adopted in various states since that time.

Id. at 3136-37.

The importance of preserving party effectiveness and responsibility was also emphasized by legislators of both parties in the 1984 General Assembly which declined to amend § 9-431, the law invalidated below. [6/] At the legislative hearings, Rep. Cibes, a professor of political science, stated:

> [T]he public at large does have an interest in maintaining strong party organizations with coherent policies clearly competitive with each other. And permitting unaffiliated voters to vote not to mention the other horrible things that could happen if state party rules would so provide, permitting unaffiliated voters to vote in party primaries provides a possible end run around the party faithful. It weakens parties and it

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6/ Excepts from the hearings and floor debates are set forth in the Addendum [hereafter Leg. Add.] in more detail.

> weakens party competition. And I don't think the public at large would be well served by the passage of 5525.

Joint Committee, Government Administration And Elections, Public Hearings, Pt. 1, 1984 Reg. Sess., p. 173.[7/]

These considerations were also expressed on the floor of the House of Representatives by legislators from both parties:

7/ He also noted that "[p]arties do serve useful functions. Parties serve as linkage devices between the public and government.... Parties serve as linkage devices between branches of government. But parties can't perform these functions without organization. And organization of parties is weakened by primaries and especially by adoption of a bill like 5525 which I urge your rejection of. Id. at 172.(See Leg. Add. 14a-18a).

> "[O]ur government goes forward because we have two strong party systems. We do not have two strong party systems in the State of Connecticut, but I can't help believe that it's going to strengthen our party by letting an unaffiliated voter come into one party and not participate except to cast a vote."

27 Conn. House Proc., Pt. 5, 1984 Reg. Sess., p. 1548 (Rep. Rothman, Rep.).

> The state does have an interest in preserving inviolate the integrity of its electoral process, be that in the general election or the primary election. Primary elections are instruments of the state just like general elections.... The state also has an interest in preserving the two-party system.

27 Conn. House Proc., Pt. 5, Jan. Reg. Sess., pp. 1527-28. (Rep. Cibes, Dem.).

In response to the argument that a party could select its candidates by

lottery if it so desired, the Senate Majority Leader stated: "I'm not sure that my colleague, Senator Robertson, is really serious when he says we should be able to select our candidates any way we want - by lottery, by chance - any way we want, because that candidate may end up being my Governor, my State Senator, my Congressman...."

27 Conn. Sen. Proc., Pt. 4, 1984 Reg. Sess., p. 1565, (Sen. Schneller, Dem.).

The legislative findings are well supported. The Committtee on Political Parties of the American Political Science Association has concluded:

> The closed primary deserves preference because it is more readily compatible with the development of a responsible party system. However imperfectly the idea may have worked out in some instances, it tends to support the concept of the party as an association of like-minded people. On the other hand, the open primary tends to destroy the concept of membership as the basis of party organization.

44 Am. Pol. Sci. Rev., supra, at 71 (Supp.) (1950) (emphasis in original). See also id. at 72.

Charles Evans Hughes, whose post convention primary proposal was referred to as a model for the Connecticut primary law, [8/] wrote that "[t]he failure to have a suitable party enrollment as a

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8/ 6 Conn. House Proc., Pt. 6, 1955 Reg. Sess., p. 3136.

qualification for voting at the primary...would make a travesty of party representation." 10 Nat. Mun. Rev., supra, at 26. Although he was speaking about members of one party determining the nominations of another, the legislature was justified in concluding that the same party breakdown could occur when non-members also controlled those nominations. "It [lack of a party affiliation requirement] is to confuse party nominations and independent nominations." Id.

Open primaries may weaken the influence of party leaders and membership, especially the party's "core constituencies."

> This may make individual voters feel less restricted, but insofar as it reduces the meaning of the party label and weakens the party ties of elected officials, the result hardly enhances the functioning of democracy.

Price, Bringing Back The Parties 134 (1984) (emphasis added). In view of all these considerations, the State was amply warranted in strengthening the accountability of a political party by choosing a closed primary system. The State has sought to ensure that nominations to public office are clearly those of the party and not some amorphous group. The public should know who answers for public officials and candidates.[9/]

9/ "[I]t seems fairly clear that the open primary at times makes

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Connecticut has selected the primary system which its constitutionally elected representatives concluded would promote party responsibility and effectiveness.[10/] This is a choice which a

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difficult the maintenance of orientations differentiating the two parties...." V.O. Key, Politics, Parties and Pressure Groups, supra, at 392. See also C.E. Merriam and H.F. Gosnell, The American Party System 317 (4th ed. 1949); D. Lockard, Politics Of State and Local Government 193-194 (1963); V.O. Key, American State Politics 189-191 (1956) (discussing the effect of primaries on party organization, citing data from Connecticut and elsewhere); J. White, The Fractured Electorate 104 (1983); M. Jewell, Parties and Primaries, Nominating State Governors 292 (1983).

10/ See also L. Sabato, The Democratic Party Primary In Virginia 132 (1977), discussing the Connecticut primary.

state must be able to make under "Our Federalism." Cf. Younger v. Harris, 401 U.S. 37, 44 (1971). (Black, J.).

D. The Court Erred In Treating A Major Political Party Like An Intimate Human Relationship.

The Court of Appeals committed a basic error when it compared a major political party to "'certain intimate human relationships'" such as marriage, raising and educating children and living with relatives, under Roberts v. United States Jaycees, supra, 104 S.Ct. 3244 (1984). J.S. App. 72. The court linked to "that select group of intimate relationships and bonds" support of a candidate for election. J.S. App. 73-4. This fundamental misapplication of Roberts places virtually all electoral

laws in jeopardy of previously unrecognized constitutional challenges.

In Roberts, this Court held that the Jaycees were neither small nor selective and lacked the distinctive characteristics that would entitle them to special constitutional protection. 104 S.Ct. at 3251. It was only with truly intimate groups that freedom of association was an "intrinsic element of personal liberty." Id. at 3250-51. The Jaycees in Roberts had fewer than 900 members. The Court of Appeals found that there were 477,749 Republicans in Connecticut. J.S. App. 21 n. 4. There is absolutely nothing in the record showing that the Connecticut Republicans,

a major political party controlling both houses of the Connecticut legislature and one half of the State's Congressional delegation,[11/] are small and selective. Nor could this be so when any voter can join that party by filling out a simple form that requires no loyalty oath. Conn. Gen. Stat., §§ 9-55, 9-56, 9-57.

This is one of the major defects in the opinion below. It treats the public electoral function of a major political party as just another private, internal affair.

11/ Conn. State Register and Manual 1985, pp. 119-133, 179, 181.

E. The Court Misapplied Principles Concerning A National Convention To A State Party Primary.

The Court below incorrectly relied on Democratic Party of the United States v. Wisconsin, 450 U.S. 107 (1981), which dealt with a national, not a state, party. J.S. App. 92-97.[12/] Its misapplication in this case threatens a vast number of election laws in all the

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12/ The vital distinction between state laws regulating a state party as opposed to a national one was recognized again in the dissent by Justice Stevens, joined by Justices Rehnquist and O'Connor, from the dismissal of the appeals in Bellotti v. Connolly, supra, 103 S.Ct. 1510 (1980). That dissent states that, "unlike Wisconsin's attempt to control delegates in a nationwide party contest, the Massachusetts rule applies to campaigns for statewide office." Id. at 1513.

States. See Amicus Brief In Support Of Jurisdictional Statement, filed in this case by New York on behalf of 15 States. ("The holding below threatens...[state] power to control any other nomination procedures, even a requirement that primary elections be held at all." Id. at 4-5).

In Democratic Party, the issue was only "whether the State may compel the National Party to seat a delegation chosen in a way that violates the rules of the Party." Id. at 121 (emphasis added). The Court found that "[i]t is for the National Party--and not the Wisconsin Legislature or any court--to determine the appropriate standards for

participation in the Party's candidate selection process." Id. at 124 n. 27 (emphasis added).

Moreover, the Court in Democratic Party stated that Cousins v. Wigoda, 419 U.S. 477 (1975), which it found controlling, was decided "'in the context of the selection of delegates to the National Party Convention.'" 450 U.S. at 121.[13/]

13/ In Cousins the Court stated that the selection of national convention delegates could not be controlled by each state law. "Such a regime could seriously undercut or indeed destroy the effectiveness of the National Party Convention as a concerted enterprise engaged in the vital process of choosing Presidential and Vice-Presidential candidates--a process which usually involves

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F. The Court Improperly Used A Severe Standard Of Review That Preordains The Unconstitutionality Of Many State Election Laws.

Because of its unprecedented perception of associational rights, the Court of Appeals subjected the statute to

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coalitions cutting across state lines." Id. at 490. "[T]he pervasive national interest" had to prevail. Id. See also Novak, Rotunda and Young, Constitutional Law 786 (2d ed. 1983) ("[A] state may not attempt, as it did in Wigoda, an extraterritorial extension of state jurisdiction...."); Rotunda, Constitutional And Statutory Restrictions On Political Parties In The Wake Of Cousins v. Wigoda, 53 Tex. L.R. 935, 963 (1975). The author believed that Connecticut's law was valid. Letter to District Court, June 15, 1984, J.A. 110-15.

"strict judicial scrutiny." J.S. App. 112. This made it almost impossible to defend the law's constitutionality. Under the Court's reasoning, myriad election laws of all the states are now subject to a new attack.

The opinion below contravenes principles of review repeatedly emphasized as appropriate for election cases. See, e.g., Anderson v. Celebreeze, ____U.S.____, 103 S.Ct. 1564, 1569-70 (1983) (referring to "reasonable, non-discriminatory restrictions"); Rodriquez v. Popular Democratic Party, 457 U.S. 1, 13 (1982) (a unanimous opinion by the Chief Justice employing a "not unreasonable" standard); Storer v.

Brown, 415 U.S. 724, 730 (1974) (recognizing that there must be substantial regulation of elections). As the three-judge court said in upholding this very statute,

> 'Not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review.' [citations omitted]... It has never been suggested that [the rule of these decisions] automatically invalidates every substantial restriction on the right to vote or to associate.' (Emphasis supplied.)

Nader v. Schaffer, supra, at 848-49, quoting Bullock v. Carter, 405 U.S. 134 (1972), and Storer v. Brown, supra.

The constitutionality of election laws should never be judged so rigidly and mechanically. Instead, "the character and magnitude" of the alleged

constitutional injury must be considered. Anderson v. Celebreeze, supra, 103 S.Ct. 1564, 1570 (1983). Then the precise interests of the State must be identified and evaluated, including their legitimacy and strength. A decision is to be reached "[o]nly after weighing all these factors." Id. Even so, "the state's important regulatory interests are generally sufficient to justify reasonable, non-discriminatory restrictions." Id. at 1569-70. The Anderson test was ignored by the Court of Appeals. Instead, it applied its own draconian one which few state election statutes could survive.

The Court of Appeals imposed a virtually insuperable burden on Connecticut when it demanded proof of a compelling state interest. J.S. App. 112. This approach conflicts with that of this Court and other circuits. See, e.g., Anderson v. Celebreeze, supra; Storer v. Brown, supra; Hall v. Simcox, 766 F.2d 1171 (7th Cir. 1985), cert den., ___U.S. ____, 106 S.Ct. 528 (1985);[14/] Bergland v. Harris, 767 F.2d 1551 (11th Cir. 1985); Baer v. Meyer, 728 F.2d 471 (10th Cir. 1984); Dart v. Brown, 717 F.2d

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14/ "The courts may sometimes talk the language of least drastic means but they only strike down ballot access regulations that are unreasonable...." Id. at 1174. (Posner, J.) (emphasis added).

1491 (5th Cir. 1983). 15/

1. The Interests Of The State Are Substantial And Were Substantially Ignored.

The Court of Appeals essentially ignored the effect of the party system on public policy and government.16/ It never

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15/ In Dart v. Brown, the Fifth Circuit, in referring to American Party of Texas v. White, 415 U.S. 767 (1974) and Storer v. Brown, supra, stated: "[W]e believe Professor Tribe fairly characterizes these two opinions as a whole in stating that: '... each actually assayed the requirements by a far less demanding standard. In particular, the Court in several instances did not require whether a less restrictive alternative would adequately protect the state's interests.... The standard of review actually applied, therefore, seems to have been a mix of strict and minimal scrutiny.' L.Tribe, American Constitutional Law (1978), 783." 717 F.2d 1491, 1503.

16/ See, e.g. ch., VIII, "Party Government in the United States" in

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discussed party responsibility, let alone its importance to the public. It disregarded the legislative and political science evidence outlined previously as well as the judicial findings in Nader, supra. This violated basic principles of constitutional review.

> [W]hen a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take

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W.W. Wilson, Constitutional Government in the United States, supra, at 198-222. The party "that has served us so well might now master us if we left it irresponsible. We must see to it that it is made responsible." Id. at 220.

> judicial cognizance of all matters of general knowledge.

Muller v. Oregon, 208 U.S. 412, 421 (1908) (referring to numerous other laws and government reports). Thirty-eight states have closed primaries. See Leg. Add. 57a. A legislator noted the "great deal of comparative political research" which indicated that open primary states "have less responsive public policy decisions being made." L. Add. 18a.[17/] The legislative proceedings, excerpts of which were provided the Court, should

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17/ See, e.g., Report of the Committee on Political Parties of the American Political Science Association, quoted previously, prepared after consultation with many experts and public officials. 44 Am. Pol. Sci. Rev., supra, at vii-viii (Supp.) .

have been judicial noticed. Alaska v. American Can Company, 358 U.S. 224, 226-27 (1959); see also Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 509 (1981) (a legislative judgment that "is not manifestly unreasonable" should not be set aside.)

The legislature could find that by allowing major party nominations to be determined by non-party forces, the party's ability to carry out its programs could be impaired. The party could avoid public accountability. The unaffiliateds, in turn, would lack an organization with which to deal with officials whom they had helped nominate. The ties between the electors and the elected would weaken.

In addition, the incentive to join a political party would be lost. See, e.g., Leg. Add., 14a-41a, 55a-56a, including remarks by various legislators, the Governor, party spokespersons, and the League of Women Voters.

None of these concerns were seriously addressed by the Court below, even though they were central to the legislative history. Instead, the Court apparently made legislative and political judgments of its own in its perception of the supposedly beneficial effects of the open primary. J.S. App. 121-22.

The Court of Appeals also disregarded Storer v. Brown, 417 U.S. 724, 736 (1974), which held that

preserving political stability by prohibiting temporary party changes by candidates is "not only permissible, but also compelling." It overrides any contrary claim of associational rights. Id.[18/] Cf. American Party of Texas v.

18/ See also Developments In The Law Elections, 88 Harv. L.R. 1111, 1138 (1975), which states: "It seems undeniable that the political stability that a two-party system fosters...is a compelling state interest." Four state interests which justify party affiliation requirements were identified. Id. at 1168-1169. In addition, the Nader decision recognized that without such requirements, raiding, was possible. This was "a practice 'whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of another party's primary'" 417 F.Supp. at 846, quoting Rosario v. Rockefeller, 410 U.S. 752, 760 (1973). "The Court did not say, 'voters who are members of one party....'" 417 F.Supp. at 646 n.7.

White, 415 U.S. 767, 786 (1974), ("the state may determine that it is essential to the integrity of the nominating process" to prohibit voters at a party primary from signing another party's ballot petition).

The Court of Appeals, furthermore, completely mischaracterized the State's interest when it claimed that the State was "portraying change in the political order as anathema." J.S. App. 123. It is not the status quo which is at issue here, but rather the State's ability to structure its electoral system, including primary voter qualifications, in light of its own concerns and experience. See Rodriquez, 457 U.S. 1, 8, 13-14.

The misuse of the strict scrutiny test, moreover, led the Court below to dismiss the problem of voter confusion. J.S. App. 118-119. The legislature could properly find that it would be difficult for the general public to understand what a candidate stood for who was nominated in part by an unknown amorphous body outside the party, while nevertheless using the party name. See, e.g., Nader v. Schaffer, supra, 417 F. Supp. at 845.[19/]

19/ "[T]hat person could be running under your label, under our label, and have nothing to do with our views whatsoever." Rep. Torpey, (Dem.), Leg. Add. 39a. See also comments by Rep. Foley (Rep.), id. at 42a.

The appellant protests in the strongest terms the Court's assertion that the State is claiming an interest "in deciding the ideological slant and bases of support for a political party." J.S. App. 119. This assertion is made without any evidence whatsoever. The State has never claimed any such interest. The party is completely free to determine whatever ideology and support base that it wants. This case only involves voter qualifications.

The Court of Appeals substantially ignores certain essential facts. The elections at issue were created not by the parties, but by the State. They are financed by the public. See, e.g., SS

9-436, 9-436a, 9-441, Conn. Gen. Stats. The State grants the nominees of major political parties automatic ballot access. It also grants them preferential ballot access over the candidates of minor and petitioning parties. §§ 9-249a, 9-379, Conn. Gen. Stats. All these privileges, granted at taxpayer expense, are keyed to the party label.

In return, the public--speaking through its elected representatives-- has a right to ensure that the nomination carrying the major party label is in fact the nomination of members of that party.

As Justice Holmes stated in referring to the advantage of official ballot access:

> It would be a strange inversion to say that no laws can be passed upon the mode of voting at a preliminary meeting held only for the purpose of getting names printed upon an official ballot when laws can be passed affecting the final vote. The Legislature has a right to attach reasonable conditions to that advantage, if it has a right to grant the advantage.

Commonwealth v. Rogers, 181 Mass. 184, 63 N.E. 421, 423 (1902) (emphasis added).

2. The Interests Of The Party Were Grossly Inflated By The Court of Appeals.

Despite the extraordinary rhetoric of the Court of Appeals, the party's purported associational interests are de minimis.[20/] The party is free to adopt

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20/ In fact, Connecticut is among the "states offering maximum protection to party association rights by requiring voters to register their party affiliation and prohibiting

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whatever philosophy it wants and to send any message to the voters that it chooses. Nothing prevents it from polling unaffiliateds and considering their desires. Nothing prevents it from enrolling willing unaffiliateds as members.

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> changes in party affiliation after the end of the candidate declaration time. All states in this category thus pass the strict test. Not only would those states meet any party associational rights challenges, but their statutes are constructed in such a manner as to be politically beneficial to the two-party system." Carr and Scott, The Constitutionality of State Primary System: An Associational Rights Analysis, 10 J. Contemp. L. 83, 117-18 (1984)

In addition, nothing prevents a party from soliciting financial or volunteer support from unaffiliateds in a primary, or at a general election. Absolutely nothing prevents a major party from nominating candidates with bipartisan and independent appeal, if the party so desires.[21/]

In fact, one may enroll with a party up to twelve noon of the last business

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21/ See Prof. Rotunda letter, supra, J.A. 110-15. "The state law has no extraterritorial application; it does not discriminate against any party nor does it discriminate on the basis of race....[It] does not restrain the Republican Party from selecting candidates with bipartisan support.... The qualified voters in the primary can vote for whomever they wish". Id. at 111-12.

day before a primary to vote in that primary. Conn. Public Acts 84-118. This is an absolutely minimal limitation compared to the eight and eleven month enrollment cut off dates that were upheld by this Court in Rosario v. Rockefeller, 410 U.S. 752 (1973). It simply defies reason that there could be a greater associational injury when a political party is prevented from having people vote in its primaries who voluntarily elect not to affiliate with that party than when a person can not vote because of those deadlines. 22/ And the present

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22/ "Absent a willingness to profess such affiliation, it would be tenuous to assert that substantial associational rights were being

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law does not even begin to compare with the statutes in Williams v. Rhodes, 393 U.S. 23 (1968), cited by the Court of Appeals (J.S. App. 79-82), which made it virtually impossible for a new party to be placed on the ballot.

The Court of Appeals acknowledged that the alleged State intrusion was "not readily apparent", and that "[i]n and of itself, legislative definition of an association's boundaries may not appear to run afoul of the first

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> abridged; without a communality of interests, there is little association to abridge." Tribe, American Constitutional Law, § 13-23 at 793 (1978).

amendment." J.S. App. 99, 101-2. The Court made the inapparent apparent because it believed that "the inexorable effect" of the statute would alter the party's message. J.S. App. 102.[23/]

23/ Of course that argument, as well as the one that there is nothing the plaintiffs may do to enforce their rule under the state statutes, could be made as to virtually all state election laws, including those cocnerning polling hours and places, legislative districts, voter qualifications and voting rights in general. In Rodriquez, supra, the Court stated: "The Commonwealth's choice to fill legislative vacancies by appointment rather than by a full-scale special election may have some effect on the right of its citizens to elect the members of the Puerto Rico Legislature; however, the effect is minimal, and like that in Valenti, it does not fall disproportionately on any discrete group of voters, candidates, or political parties." 457 U.S. at 12.

457 U.S. at 12. The lower court in Roberts v. Jaycees, supra, had also assumed that "'some change in the Jaycees' philosophical cast can reasonably be expected'" if women were admitted. 104 S.Ct. at 3255. This Court, in reversing, condemned this supposition as unsupported by the record. Id.

Similarly, there is nothing in the record in this case to substantiate the assumptions of the Court of Appeals. The Court stated that the party subcommittee which proposed the plaintiffs' rule had reached certain conclusions. J.S. App. 22. A proposed stipulation to this effect, however, was withdrawn in the

District Court by mutual consent. J.S. App. 249-50, 281-2. The trial court made no such finding. The Court of Appeals simply misread the record.

The withdrawal followed discovery proceedings which suggested that the rule may have been motivated at least in part by the personal interests of one of the individual plaintiffs as distinguished from that of the party.[24/]

24/ In 1982, Senator Weicker was challenged for renomination by Prescott S. Bush, Jr. The Senator said then that without "some drastic restructuring of the state G.O.P. and an influx of non-Republican voters that Mr. Bush could win the Republican primary." The Senator tried to solicit independents to register Republican for the purpose of the primary. J.A. 116-129. See also depositions of Thomas D'Amore and Peter Gold, placed under seal by the District Court.

In addition, plaintiffs' claim that the subcommittee had reached various conclusions was not substantiated by some subcommittee members deposed. See depositions of Rep. Mae Schmiddle, July 13, 1984, pp. 27-37, 45-46, and Sen. Fred H. Lovegrove, July 13, 1984, pp. 8-10. Rep. Schmiddle testified as follows:

> Q. ... Please feel free to indicate whatever changes that you would make if you had to draft that [plaintiffs' alleged conclusions of the party sub-committee which the Court of Appeals later cited].
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> A. You know, I sort of feel that the way in which this is phrased, it sort of is putting words in the mouth of all Republicans or maybe words in the mouth of the Republican Party ...." Dep., p. 34.

In addition, assertions by the Court of Appeals as to legislative motivation

(J.S. App. 108-9) are also completely unsupported by the record.[25/] Here again, the trial court made no such findings. The same is true of the charge that the statute had been "enacted by a Democratic controlled state legislature." J.S. App. 101. Not only is this devoid of any evidentiary support, it is simply incorrect. In the 1955 legislature that passed this law, the Republicans had a two to one majority in the House of Representatives. Conn. State Register and Manual 1985, p. 180.

25/ Such inquiry is improper in any event. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 508 (1975); Fletcher v. Peck, 10 U.S. (6 Cr.) 87, 130 (1810).

Finally, in weighing the party's interest, the Court overlooked the fact that the delegates who adopted the rule were holdovers from a prior convention, and as one Republican legislator complained, had not been selected "to make a decision on an issue such as this." 27 Conn. House Proc. Pt. 5, 1984 Reg. Sess., p. 1549.[26/]

G. The Opinion Below Has Far-Reaching Implications Impairing Orderly State Election Administration.

26/ The delegates were those who attended the 1982 Convention. Less than 60% of the convention voted for the rule. J.A. 49-64, 71-72. A resolution which would have required a majority of town committees to endorse the rule was defeated. J.A. 76 (Res. 10), Joint Subm. Docs., Ex. N.

State regulation of elections is needed "'if some sort of order, rather than chaos, is to accompany the democratic processes.'" Anderson v. Celebreeze, supra, 103 S.Ct. at 1569 (quoting Storer v. Brown, supra, at 730). The validity of state election laws cannot depend on the passing fancies of political conventions.

If a single party may veto the state primary law in this case, then many other election statutes may fall by the same logic.[27/]

27/ These include in Connecticut, the right to a primary by a candidate who receives at least 20% of the convention vote, § 9-444, C.G.S.; the right to a primary to begin

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In addition, the party rule in this case will by itself generate enormous

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with, id.; the right to primary for municipal and certain party offices by obtaining sufficient petition signatures, §§ 9-406, 9-407, C.G.S.; the right to absentee ballots for a primary, ch. 144a, C.G.S.; party enrollment rights provided by law in the face of any conflicting party rules concerning loyalty oaths, test for affiliation, and durational residency requirements, see §§ 9-23a, 9-56, 9-57, C.G.S.

The court's dictum (J.S. App. 129-30) that the State could simply limit the ability of a party to change its rules does not even begin to address these concerns and is inconsistent with the court's premise of party insulation from state laws. It could also spawn further litigation based on strict scrutiny, and create widespread uncertainty and confusion in all the states.

confusion and disorder for election administrators. Different voting qualifications, that would apply unevenly and irregularly to various parties and to various offices, would have to be enforced.[28/]

Under the party rule, unaffiliateds could not vote for all offices such as State Senator and Representative. Separate and distinct ballot labels would

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28/ Prof. Rotunda stated that under plaintiffs' rule, "the burden on state election judges may well be heavy and the confusion on the voters great." J.A. 113. The Governor's veto of a bill which would have authorized the party rule referred to the "administrative chaos" that would be created for state and town officials. Leg. Add. 56a-57a. The legislature sustained his veto. Id. 57a.

therefore be needed for unaffiliateds either on the same or additional voting machines. J.S. App. 244 at 268-269, ¶46.

Unaffiliated voters, moreover, would have to be separated from members of the other major political party. Id. at 267-268, ¶45; 269, ¶47. Additional, specially trained officials and more voting machines would probably be required. Id. at 269, ¶48.

The record also contains evidence that absentee ballot administration under the rule would require extreme care and would probably result in considerable confusion and many mistakes. J.S. App. 288, 293-298; see also id. at 286-287, ¶52.

Moreover, all this would have to be done amidst the pressures and uncertainties that already exist at polling places on primary day. The administrative burdens would fall largely on part-time moderators, assistant registrars, checkers, machine tenders and absentee ballot counters, most of whom serve at no more than one or two elections a year.[29/]

29/ Sen. Weicker admitted these burdens would be costly. Leg. Add. 9a. See also remarks by Rep. Foley, Rep. Cibes, Sen. Schneller and Governor's Veto Message, Leg. Add., 13a, 43a, 46a-47a 56a-57a. "[H]ere we are mandating costs for municipalities without providing compensation for them." Rep. Foley (Rep.), id. at 13a.

Furthermore, the opinion of the Court of Appeals does not prevent one from voting in both party primaries if permitted by party rules.

The State, under the Court of Appeals ruling, could not pass uniform primary legislation unless parties consent. Party rules would thereby be given a practical veto over State law, and the party would become a legislature unto itself.

II. The Opinion Below Ignores The Constitutional Role Of The States In Setting Voter Qualifications And Regulating Elections Under Art. I, SS 2 And 4, And the Tenth And Seventeenth Amendments.

The Court of Appeals essentially ignored those portions of Article I, SS 2

and 4, and the 10th and 17th Amendments that empower States to set voter qualifications and regulate elections.

Madison stated that the election of the House of Representatives would depend upon the State legislative authority in the first instance, "and will, probably, forever be conducted by the officers and according to the laws of the States." The Federalist, No. 44, p. 307 (J. Cooke ed. 1961). Voter qualifications were to be "conformable to the standard already established, or which may be established, by the State itself." The Federalist, No. 52, id. at 354[30/]

30/ The concurring opinion relied on a Federalist text which used the word

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"comfortable." J.S. App. 137-38. However, the J. Cooke edition (1961), quoted by the majority, uses the term "conformable." J.S. App. 48. The term "conformable" is the one also used in the earliest collected edition, The Federalist; A Collection of Essays, Written in Favor of the New Constitution Agreed Upon by the Federal Convetion September 17, 1787 (M'Lean pub. 1788), Vol. 2, p. 123 (copy which belonged to Thomas Jefferson), held by the Library of Congress, Thomas Jefferson Bldng., Rm. 204. Telephone conversation with Peter Van Wengen, librarian, rare books and manuscripts, Library of Congress, Feb. 14, 1986. The 1961 Rossiter edition cited by the concurring opinion states that its text is taken from the "'"McLean edition 'of 1788'" Id. at xvii. The word "conformable" is also used in The Federalist, On The New Constitution, Written in the Year 1788, ("The numbers written by Mr. Madison corrected by himself") M'Carty and Davis pub. 1826) at p. 295 (Conn. State Library), as well as other editions reviewed.

Under the Constitutional distribution of powers, the States initially determine voter qualifications for members of Congress as well as State offices. Storer v. Brown, 415 U.S. at 729-730; Katzenback v. Morgan, 384 U.S. 641, 647 (1966) (citing Art. I, § 2 and the 17th Amendment). Moreover, as Justice Black wrote in Oregon v. Mitchell, 400 U.S. 112, 125 (1970): "[A]rt. I, § 2, is a clear indication that the Framers intended the States to determine the qualifications of their own voters for state offices, because those qualifications were adopted for federal offices unless Congress directs otherwise under Art. I, § 4."[31/]

31/ In that case the 18-year-old minimum age requirement of the Voting Rights

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Just last Term, this Court stressed "the States' 'residuary and inviolable sovereignty,'" recognizing that:

> The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government. The States were vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and their role in presidential elections. U.S. Const., Art. I, § 2, and Art. II, § 1.

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> Amendments of 1970 was upheld for national elections, but invalidated for state and local elections. In addition, provisions barring literacy tests in all elections, and residency requirements in Prsidential elections were sustained.

Garcia v. San Antonio Metropolitan Transit Authority, ____U.S. ____, 105 S.Ct. 1005, 1017, 1018 (1985).

As stated by one of the sources cited by the concurring opinion below:

> This [Art. I, § 2] left the existing qualifications of each state in force within its bounds, avoided all interference by the Federal Government, and secured to the states the right to prescribe the qualifications for their own and federal voters.

D. Hutchinson, The Foundations of the Constitution 31 (1975). 32/

32/ This sentence immediately follows the portion quoted in that opinion, but was omitted from it. J.S. App. 134-35.

Article I, § 4, furthermore, provides that the manner of holding Congressional elections "shall be prescribed in each State by the Legislature thereof," subject to regulations made or altered by Congress. It does not vest this power in a political convention.

The Court of Appeals' decision thus severely undercuts Congress's power to deal with primaries as it does that of the States. The power of Congress under § 4 flows in the same channel as does that of the States. "[T]he conferring of the power on the States and the reservation of the authority in Congress were absolutely coterminous," except as

to the place of voting for Senate. Newberry v. United States, 256 U.S. at 262. (White, C.J., dissenting but concurring in part.)

Art. I, § 4, should be interpreted so as to effectuate, not defeat, its purpose. United States v. Classic, 313 U.S. 299, 316 (1941).[33/] A mere disagreement between the State and a political element should not be enough to nullify a state election law. Otherwise, the essential electoral authority

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33/ "For if there is to be no control of the process which presents men for election, the value of the control over the election is largely gone." Note, Federal Control of Senatorial Primary Elections, 22 Col. L.R. 54, 56 (1922).

allocated by the Constitution would unravel. [34/]

Furthermore, with respect to state elections, Justice Black stated in Oregon, supra:

> It is obvious that the whole Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States.

400 U.S. at 125.

The 14th, 15th, 19th and 24th Amendments

34/ "...[T]he Constitution is not self-destructive. In other words, ... the powers which it confers on the one hand it does not immediately take away on the other...." Billings v. United States, 232 U.S. 261, 282 (1914).

each assume that the states have general election supervision. Id. at 125-26. Moreover, the 14th Amendment did not "strip the States of their power, carefully preserved in the original constitution, to govern themselves." Id. at 127. States can set voter qualifications for their own officials, in the absence of specific constitutional limits. Id. at 125, 135. For example, State election authority is coordinate with the 15th amendment and "one may not destroy the other without bringing about the destruction of both." Guinn v. United States, 238 U.S. 347, 362 (1915).

Unless the judgment below is reversed, this legislative discretion

protected by the Constitution will be subverted.

III. The Party Rule Violates Art. I, § 2, And The Seventeenth Amendment Because It Sets Different Voter Qualifications For Congress Than It Does For The State Legislature.

The Court of Appeals found it "unnecessary" to decide the meaning of Art. I, § 2, and the 17th Amendment because it held that the voter qualifications clauses did not apply in primaries. J.S. App.41 n. 11. The Court thus severed important constitutional protections of voting rights from an integral part of the election process.

A party rule must itself be "constitutionally permissible."

Democratic Party of the U.S. v. Wisconsin, supra, at 123 n. 25; Cousins v. Wigoda, supra, at 491. Art. I, S 2, cl. 1, of the Constitution provides that "...the Electors [for U.S. House of Representatives] in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." The 17th Amendment includes virtually identical language with respect to electors for U.S. Senate.

In Oregon v. Mitchell, 400 U.S. 112 (1970), Justice Stewart, in an opinion concurring and dissenting in part, joined by the Chief Justice and Justice Blackmun, stated:

> The Constitution thus adopts as the federal standard the standard which each State has chosen for itself.... Accordingly, a state law that purported to establish distinct qualifications for congressional elections would be invalid as repugnant to Art. I, § 2, and the Seventeenth Amendment....
>
> ...[N]o State may establish distinct qualifications for congressional elections .... [T]he States are not free to prescribe qualifications for voters in federal elections which differ from those prescribed for the most numerous branch of the state legislature.

Id. at 288-289 (emphasis added).

(citations omitted). [35/] See also

35/ Justice Stewart suggested that with respect to state residency requirements for voting for federal office, Congress might prescribe different qualifications because of powers existing elsewhere in the Constitution. There was no question, however, but that a state was not free to do so. There was no dispute on this point in any of the other opinions in that case.

Katzenbach v. Morgan, 384 U.S. 641, 647 (1966); Ex Parte Yarbrough, 110 U.S. 651, 663 (1884).

In Federalist No. 39, Madison stated that in the U.S. House, the people of America would be represented "on the same principle as they are in the Legislature of a particular State." J. Cook ed. 1961, p. 255. He emphasized in Federalist No. 57:

> They [the electors] are to be the same who exercise the right in every State of electing the correspondent branch of the Legislature of the State. Id. at 385.[36/]

36/ It is significant that the commentator quoted in the concurring opinion below stated that a new qualification would have excluded "some from voting for members of

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Under plaintiffs' rule, unaffiliated voters not qualified to vote for State legislative offices in Republican primaries would nevertheless vote for Congress in those primaries.[37/] This

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> Congress, who would be able to vote for members of the state legislatures, or vice versa." Hutchinson, supra, quoted in Republican Party, et al. v. Tashjian, (emphasis added). J.S. App. 134-135. In the Constitutional debates, Madison stated that Congress would include "representatives elected by the same people who elect the state legislatures. Surely, then, if confidence is due to the latter, it must be due to the former." 5 Elliott's Debates on the Adoption of the Federal Constitution 402 (1859 ed.)

37/ Party membership has been specifically recognized as one of

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defeats the Constitutional purpose of having the people represented in Congress on the same principle that they are in their State Legislature.

The Court of Appeals claimed that the qualifications clause was not even discussed in United States v. Classic, supra. J.S. App., 53-4. Yet the Classic Court relied upon all of Art. I, § 2, cl. 1, including the qualifications section. The right to vote was secured by the Constitution "to qualified voters" for

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> the qualifications for voting under the same law involved here. See Nader v. Schaffer, supra, 417 F.Supp. at 842 n. 4, quoting Smith v. Allwright, 321 U.S. 649, 664 (1944).

the House of Representatives, and was "thus to be exercised in conformity to the requirements of state law subject to the restrictions prescribed by § 2," as well as § 4. 313 U.S. at 310. See also id. at 314, 315. In fact, the decision upheld the rights of voters qualified under state law to have their votes properly counted in a primary. Id. at 308.

In addition, this "constitutional command [Art. I, § 2] is without restriction or limitation....[and] is secured against the action of individuals as well as of states." Id. at 315. See also Smith v. Allwright, supra, 321 U.S. at 663-64 (voter qualifications in a

state primary are not matters of private law); Buckley v. Valeo, 424 U.S. 1, 11-14 n. 16 (1976) (Congress may regulate Congressional and primaries under Art. 1, § 4).[38/]

The Court of Appeals improperly divorced the "Electors" provision in Art. I, § 2 and the 17th Amendment from its application to primaries. J.S. App. 55.

> It cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.

Marbury v. Madison, 5 U.S. (1 Cr.) 137, 174 (1803).

38/ For application of Federal Election Campaign Act to primaries, including reference to Connecticut in the House Report, see Leg. Add. 2a-7a.

This illustrates another one of the major problems raised by the opinion below. A party is permitted to do what a State probably could not. Arbitrary voting qualifications may be imposed without any legal or public accountability,[39/] as state election laws collapse whenever a political party dissents.

CONCLUSION

It is therefore respectfully submitted that the judgment of the Court of Appeals should be reversed and that

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39/ This is an example of the arbitrary action that Hughes had observed could result from primaries not regulated by law. 10 Nat. Mun. Rev., supra, at 24. No real rationale was ever given for the disparate qualifications under the rule. See Leg. Add. 9a-12a

the case should be remanded with the direction that judgment be entered for the defendant.

Respectfully Submitted

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February 1986

ADDENDUM OF LEGISLATIVE MATERIALS

Note: The complete record of the 1984 Connecticut General Assembly public hearings and floor debates, excerpts of which are included herein, were submitted to the District Judge. Excerpts were also included in the addendum to the defendant-appellant's brief in the Court of Appeals.

FEDERAL ELECTION CAMPAIGN ACT

AMENDMENTS OF 1979

Title 2, United States Code

* * *

§ 431. Definitions

When used in this Act:

(1) The term "election" means-

(A) a general, special, primary, or runoff election....

* * *

CODE OF FEDERAL REGULATIONS

Title 11 - Federal Elections

§ 100.1 Scope

This subchapter is issued by the Federal Elections Commission to implement the Federal Election Campaign Act of 1971 (Pub. L. 92-225), as amended by Pub. L. 93-443, Pub. L. 94-283, Pub. L. 95-216, and Pub. L. 96-187.

§ 100.2 Election (2 U.S.C. 431(1)).

(a) "Election" means the process by which individuals, whether opposed or unopposed, seek nomination for election, or election, to Federal office. The

specific types of elections, as set forth at 11 CFR 100.2 (b), (c), (d), (e) and (f) are included in this definition.

* * *

(c) Primary Election. A primary election is an election which meets one of the following conditions: (1) An election which is held prior to a general election, as a direct result of which candidates are nominated, in accordance with applicable State law, for election to Federal office in a subsequent election is a primary election.

* * *

HOUSE REPORT NO. 96-442 RE
FEDERAL ELECTION CAMPAIGN
ACT AMENDMENTS OF 1979

(Referring to Connecticut)

* * *

Section-by-Section Explanation of the Bill

DEFINITIONS

Section 101 of the bill amends section 301 of the Federal Election Campaign Act of 1971 (2 U.S.C. 431). The section is amended as follows: (1) Election. There has been no change in the definition of election. A convention

or caucus of a political party which has the authority to nominate a candidate is considered a separate election and, thereby, has separate reporting obligations and contribution limitations. The test is whether the convention or caucus has the authority to nominate, not whether the convention actually nominates. For example, in the state of Connecticut, State law requires the district convention to choose a candidate for nomination as the party-endorsed candidate; if, however, another candidate at the convention receives at least 20 percent of the vote, a primary election is required. Since the district

convention has the authority to nominate, it would be considered an election. If a primary is held after the convention, the primary would be considered another, totally separate, election. On the other hand, an endorsing convention like the one held in Minnesota would not be considered an election since its function is to endorse a candidate who will actually be nominated in a subsequent primary.

* * *

H. Rep. No. 422, 96th Cong., 1st Sess., reprinted in 1979 U.S. Code Cong. & Ad. News 2864 (emphasis added).

1984 Legislative History

The following consists of excerpts from the debate in the 1984 Connecticut General Assembly and the public hearings of the Assembly's Joint Committee on Government Administration and Elections on proposed amendments to § 9-431, Conn. Gen. Stats., the law involved in this case.

1984 Public Hearings, Connecticut General Assembly Joint Committee, Government Administration And Elections Concerning Proposed Amendments to § 9-431

REP. ATKIN:...How about in the situation, the way the rule, as I understand it is written, you would have a primary, say

for a Congressional candidate, but not for a state rep. candidate. How would you amend that situation, if there happened to be both running in a certain state legislative district. Would somebody have to go into -- an unaffiliated voter could only in that case vote for a congressional candidate, but not a state rep candidate. Wouldn't that be a costly proposal?

SEN. WEICKER: That's correct. I think that now, and I can only guess at the motivation of the delegates....

I would imagine that it was the human instinct, or the human drive on the

part of those 900 Republicans that they just didn't want to swallow everything in one bite. They wanted to see how the system worked....

Public Hearings, Conn. Gen. Assembly, Joint Com. Govt. Admin. And Elections, Pt. 1, 1984 Reg. Sess., p. 152.

* * *

SEN. DANIELS: I think John asked Sen. Weicker this question, and I'm not sure that I understood his answer. What is the rationale of allowing unaffiliated voters to vote in the United States primary while preventing the same voter

from voting in a state primary held the same day and at the same polling places?

REP. BERMAN: I'm not sure, Senator. The proposal that I had introduced four years ago would have allowed voter to vote in any primary.

* * *

SEN. DANIELS: Well, I'll ask the minority representative the same question. Thank you.

My question, is, what is the rationale in this bill of allowing unaffiliated voters to vote for the United States candidate in a primary, and

at the same time would prevent unaffiliated voter from voting in a state senate primary held the same day, and obviously using the same polling places.

REP. SCHMIDLE: Thank you, Sen. Daniels. The bill that is before us. The bill that we are having a public hearing on, does not address any exclusionary provisions. It simply says, that a party by its own rules may do what it chooses, and it doesn't address for whom people may vote, or for whom people may not vote. That's not addressed in this bill, sir.

Id. at 157-158.

* * *

REP. FOLEY: Sure. -- of using multiple machines, and certainly we would have to have two machines each district. If the Democrats decided to have the unaffiliates also within their primary at a future date, it might mean four machines.... [H]ere we are mandating costs for municipalities without providing compensation for them.

Id. at 161.

* * *

REP. CIBES:...I do have a Ph.D. in political science. And as Senator Weicker should know, parties do serve useful functions. Parties serve as linkage devices between the public and government. Parties serve as linkage devices between branches of government. Parties serve as recruiters and socialization devices. But parties can't perform these functions without organization. And organization of parties is weakened by primaries and especially by adoption of a bill like 5525 which I urge your rejection of.

There is a particular problem with House Bill 5525. It is really improperly drafted. As drafted, it lets unregistered voters vote if party rules provide. It would let felons vote if state party rules provide. It would let people who are not residents of a municipality vote in a party primary if state party rules provide. It would let non-citizens of the United States vote in party primaries if party rules would provide. It would permit unaffiliated voters to vote in the primaries of both parties should the state party rules of both parties so provide.

It would let state party rules provide that in the -- say the 40th Assembly District, unaffiliated voters could vote but not in the 39th Assembly District. Or in the 1st Congressional District and not in the 2nd Congressional District. It would as I would further read 5525 permit a voter to vote without demonstrating his identity despite the moderator's request that he do so.

Now, certainly it is unlikely that any of these things will happen. Surely the intent of 5525 is merely to permit unaffiliated voters to vote in some circumstances but I think they're good

examples of what can happen if public policy decisions are delegated to private organizations.

* * *

And I would submit as well that the public at large does have an interest in maintaining strong party organizations with coherent policies clearly competitive with each other. And permitting unaffiliated voters to vote not to mention the other horrible things that could happen if state party rules would so provide, permitting unaffiliated voters to vote in party primaries provides a possible end run around the

party faithful. It weakens parties and it weakens party competition. And I don't think the public at large would be well served by the passage of 5525.

Id. at 172-173.

* * *

I don't know the answer to how many states permit unaffiliateds to vote. I do know that there is a great deal of comparative political research which indicates that in states which are weakened by party reforms such as proposed, basically have less responsive public policy decisions being made then in states where parties are closed to members of political parties only.

Id. at 173-174.

* * *

MS. MARGARET BERG: Members of the committee and Mr. Chairman. I'm Margaret Berg and I'm testifying for the Caucus of Connecticut Democrats in opposition to Raised Committee Bill No. 5525 for the following reasons.

First, the theory behind this bill is that a party should not be subject to state law but should be able to decide for itself how candidates are chosen.... This is a permissive law that sets a dangerous precedent. The integrity of

the election process is at stake when such a vital part of the process as candidate selection is taken out from under the protection of the state election law.

Would the parties protect the voters' right to free choice, for instance? As Election Attorney Albert Lenge asked in an early January article in the Hartford Courant. What if the party were to decide that there would no longer be any primaries allowing the party leaders to select a candidate with no way to challenge the closed monopoly? The change contemplated by the republicans

and with this bill would make is merely cosmetic. It doesn't give the unaffiliates anything they don't already have....

I feel that the party primary would weaken the party. It would -- unaffiliates would lose their incentive to join a party. Second, parties would be weakened because party members and workers would lose their incentive to stay in the party. Particularly if both parties opened up their primaries to unaffiliates as probably would be the case if this bill passes.

And third, the principles of a party would be weakened because candidates would have to appeal to voters not necessarily committed to those principles. So, I think it's a bad bill. It's bad for republicans. It's bad for unaffiliates and bad for democrats.

Id. at 186-188.

* * *

MS. NANCY BEALS [League of Women Voters of Connecticut]

The League of Women Voters has always worked to promote full participation in the political process by citizens of voting age....

Primaries, like caucuses and conventions, are part of a party's nominating process. And we believe that only enrolled party members should be eligible to participate in party nomination processes....

Party membership is open to all and in no way restricts a voter's freedom to choose among candidates on election day....

We support the concept of a strong two party system and we are concerned that permitting unaffiliated voters to vote in primaries may weaken rather then strengthen the two party system by removing one of the most important incentives for party membership. We urge an unfavorable report on House Bill 5525.

Id. at 189.

* * *

MR. FITZGERALD: [Chairman of the Connecticut Democratic State Central Committee]. I do not believe the legislature should give the republicans or any other party carte blanche to do whatever it wants to do however it wants to do it. What's fair for the goose is fair for the gander. The state has a legitimate interest in maintaining the strength of the two party system and this legislature certainly should decide this issue of party membership one way or the other for both parties. To let one party

do its thing regardless of state policy considerations is dangerous. And it's also a cop out.

This legislature should decide whether party membership will continue to mean something in the State of Connecticut or whether it will be reduced to a nullity. It should be the same law for both parties.

Remember, ladies and gentlemen, a long leash may be pulled in many directions. Those who agree with the direction of the republican leadership at the moment and who wants to give them free rein should realize that at some future date, future

leaders could use those reins to gallop off in the opposite direction.

I believe in the political process. I believe in the two party system. And I believe without any hesitation that this proposal will weaken the two party system.

Id. at 194-195.

* * *

1984 House Proceedings Rejecting Amendments to § 9-431

REP. CIBES (39th d.): Mr. Speaker, I, too, urge rejection of this amendment. The state does have an interest in

preserving inviolate the integrity of its electoral process, be that in the general election or the primary election. Primary elections are instruments of the state just like general elections. And the state has an interest in insuring that the primary elections are honest, they're conducted above board.

And, as a token of that interest, the state pays for the primary elections in the state. The state has a legitimate interest in preventing unaffiliated voters from voting in both the primaries which this particular amendment would not forbid. So, that an unaffiliated voter

would have an advantage, Mr. Speaker, by being permitted to vote in both the Democratic and Republican party primaries, should the party rules so provide.

[T]he state also has an interest in preserving the two-party system.

In insuring that in primary elections, strong party organizations are preserved, that they have coherent policies, that the parties are clearly competitive with each other. Probably the most eloquent statement of the interest of the state has been set forth in a case which is often cited to support

the Weicker proposal, but which in reality does not. The Honorable Judge in Nater [sic] versus Schaeffer in 1976, pointed out that there are interests of the state, legitimate interests of the state, in preserving the party primary to party members only. If a party were completely private organization, the judge said, it could limit participation in its nominating process to party members. And, Mr. Speaker, I would submit that if a party were a completely private organization, it could open its doors to anyone that saw fit.

But it isn't a completely private organization. It's a regulated situation and in that circumstance where the state has an interst, the state has a legitimate interst, I'm quoting now, in protecting party members' associational rights by legislating to protect the party from intrusion by those with adverse political principles.

In short, the state has an interest in preventing raiding by unaffiliated voters or potentially, if this situation expands, by members of the other party. A state has a more general, says the Judge, but equally legitimate interest in

protecting the overall integrity of the historic electoral process. This includes preserving parties as viable and indentifiable interest groups, insuring that the results of the primary elections in a broad sense accurately reflect the voting of party members.

Parties should be able to avoid primary election outcomes which will confuse or mislead the general electorate to the extent it relies on party labels as representative of certain ideologies and presenting [sic] fraudulent and deceptive conduct which mars the nominating process.

One of the more explicit Supreme Court cases in this regard is Rosario versus Rockefeller in 1973. In which the court held that the State of New York did, indeed, have an interest, not just in insuring that only party members voted in party primaries, but also the state had an interest in a lengthy waiting period to permit unaffiliated voters to enroll in parties.

....

This was certainly legitimate, for even the dissenters, because the dissenters said, a state does have an interest in preventing such behavior, raiding of parties, less the efficacy of

the party system and the democratic process, its usefulness in providing a unity of divergent factions in an alliance for power, would be severely impaired.

And certainly, the majority in Rosario versus Rockefeller, would have permitted such a very lengthy waiting process. It is clear that the preservation of the integrity of the electoral process is a legitimate and valid state goal.

I believe the General Assembly, by rejecting this amendment, would preserve the state's interest in preserving the integrity of the electoral process.

I urge the defeat of this amendment.

27 Conn. House Proceedings, Pt. 5, 1984 Reg., pp. 1527-31.

* * *

REP. ROTHMAN (111th):.... [T]he problem I have is what if my party decides to only let white males who are 24 years of age decide what my party want to do, or the rules. What if my party decides to let 16 year old vote in the primary elections or in our party rules?

I have some real problems with that and though I'm told that this is a far-out situation, certainly the last few

speakers spoke of situations which are even further away from what we're talking about.

The other thing I would just call your attention to, the theory in political science is that our government goes forward because we have two strong party systems. We do not have two strong party systems in the State of Connecticut, but I can't help believe that it's going to strengthen our party by letting an unaffiliated voter come into one party and not participate except to cast a vote.

I have to also go one step further. Because it has been said here that this came out of the convention and it is supported by Republicans. My friends, the convention that we had was not a newly called convention. The convention that we had was a convention that brought together people who had been selected to vote for candidates, not to make a decision on an issue such as this. I have some real problems with that.... Id. at 1548-49.

* * *

REP. RYBAK (66th):....But in my part of the State, this is still pretty much the rule. You register with a party and you

take an active role in the party on the local level. That's what makes our government in the small towns pretty fine government.

This amendment doesn't really open up the process at all. This amendment is kind of a public image amendment, if you will. Because the real action isn't the primary, the real action is the caucus.

....

Secondly I'd like to say I haven't had one unaffiliated voter call me in favor or this proposal.... [C]ertainly they haven't been knocking my door down.

And finally I'd like to close by saying in my part of the state, the Republican delegates and the Republican town chairman in my district oppose this proposal. And I think I'm representing them, the unaffiliated voters and the Democrats when I'm voting against this proposal.

Id. at 1550-51.

* * *

REP. TORPEY (11th):....I think a very important point is being overlooked in this process. And that is the responsibility of the parties. And by

responsibility what I'm referring to is when the candidate is running with a party label on it, that candidate should be representing the views of that party.

And if you've got people voting for the candidate that is not a member of your party, you haven't any idea where he stands. And that person could be running under your label, our label, and have nothing to do with our views whatsoever. And yet we should be held responsible as a party, whatever that representative or that candidate, if he's elected, stands for.

[I]t is very conceivable that the candidate that is out representing your party, the vast majority of your party would not support him or his positions. And therefore it's incumbent upon the parties to put up candidates, their candidates, representing their views, and if the unaffiliated want a different candidate, let him run as an independent on his own platform, standing on his own record.

Id. at 1551-52.

* * *

REP. FOLEY: (131st) ....

I recall at the public hearing on this matter, again, court cases, Wisconsin, New Jersey, North Carolina,... wonderful states, but no one ever seems to talk about Connecticut....

But in Connecticut, the court has ruled on this in Nader versus Schaeffer. The court in its opinion said, in addition to protecting the associational rights of party members, a state has a more general but equally legitimate interest in protecting the overall integrity of the historic election process. This includes preserving parties as a viable and identifiable interest groups, insuring

the results of primary elections in a broad sense accurately reflect the voting of party members, parties should be able to avoid primary election outcomes which will confuse and mislead the general electorate to the extent it relies upon party labels as a representative of certain ideologies, by preventing fraudulent and deceptive conduct which mar the nominating process.

I would submit to you this amendment as is the entire Weicker proposal, will in fact lead and mislead the voters on that path.

Id. at 1557-58.

* * *

REP. CIBES (39th): Mr. Speaker, it is my understanding that on primary days, those lists of additional unaffiliated voters are not available in the polling places on primary. And that therefore there would be an additional expense to the municipalities providing that list of unaffiliated voters in addition to the list of enrolled party members.

[T]hat's one of the reasons I would oppose this amendment, because of the additional mandated cost to municipalities.

Id. at 1587.

1984 Senate Proceedings Rejecting Amendments To § 9-431

SEN. ROBERTSON:...How each team selects their players, their line-up for the competition on election day, should be done and determined by each of those teams individually... If we decide to do it by a lottery, if we decide to pull straws out of a hat, if we decide to do it any way we wish, we should be entitled to do that....

27 Conn. Sen. Proc. pt. 4, 1984 Sess., p. 1560.

SEN. SCHNELLER:...I'm not sure that my colleague, Senator Robertson, is really serious when he says we should be able to select our candidates any way we want - by lottery, by chance - any way we want, because that candidate may end up being my Governor, my State Senator, my Congressman, and so I think there ought to be some kind of rules and some kind of order in the process by which we select candidates that run for office, and I don't think that any frivilous [sic] way any party chooses to select their candidates should be the law of this state. I think there should be a process. It should be an orderly process

and we ought to have some rules. I think one of the things that concerns many of us with the so-called Weicker Proposal that would allow unaffiliated voters to vote in a primary is that it selected certain candidates that would have unaffiliated voters select them. As I recall it, it was the Presidential, it was the Congressional, the U.S. Senatorial, and I've asked many of my Republican colleagues what would happen if we have primary on the same day for a Congressional candidate and a State Senatorial candidate. How would that process work? I guess you could have separate booths for certain candidates

and other booths for other candidates and I don't know how your're going to distinghish [sic] between the unaffiliated party voter and the party voter who can only vote in one booth. I don't really feel it's a very well thought out proposal. As a matter of fact, when I asked one of my Republican colleagues how they proposed to work it out, the answer I got was, "We're hoping you will take care of us by defeating it when it reaches the floor of the House or the Senate." All of us know that was a compromise proposal that was worked out at the last minute so that it would pass muster at a convention, but it really

wasn't a very well thought out proposal, so that I think we ought to have some rules that are fair, that pass statutory muster because the candidates that are selected through this process are candidates that will govern you and me and I think we want to feel comfortable in the manner in which those candidats are selected so that to just allow parties, willy-nilly, to select their candidates in any manner that they choose, by lottery, to use Senator Robertson's phrase or any other process, I think would be detrimental to the Republican Party, to the Democratic Party and any other party so that the manner in

which this amendment would is worded is something that I think would be detrimental to both parties and I would certainly urge you to vote against it.

Id. at 1565-67.

Senate Bill No. 5

PUBLIC ACT NO. 85-320

(Vetoed by the Governor;
Veto sustained by the Legislature)

AN ACT PERMITTING UNAFFILIATED VOTERS TO VOTE IN CERTAIN PRIMARY ELECTIONS.

[capitalized language is added by the amendment; bracketed language is deleted by it]

Section 9-431 of the general statutes is repealed and the following is substituted in lieu thereof:

[No] EXCEPT WHERE PROVIDED OTHERWISE BY STATE PARTY RULES, NO person shall be permitted to vote at a primary of a party unless he is on the last-completed enrollment list of such party in the municipality or voting district, as the case may be, but any such person offering to vote and being challenged as to his identity or residence shall, before he votes, prove by the testimony, under oath, of at least one other elector qualified to vote in such primary or by

such other evidence acceptable to the moderator either of the following which are applicable: (1) His identity with the person on whose name he offers to vote or (2) his bona fide residence in the municipality or voting district, as the case may be, provided if any person who has moved from one voting district or ward to another voting district or ward within a municipality is entitled to vote in such primary under section 9-54, such person shall not be required to prove his bona fide residence in the voting district or ward from which he moved. The rules of each party in each municipality shall prescribe whether

members of the town committee shall be elected from the municipality at large, in which case any person on the last-completed enrollment list of such party in such municipality shall be eligible to vote in a primary for the election of such committee members, or whether such committee members shall be elected from political subdivisions of such municipality, in which case only persons on the last-completed enrollment list of such party in such a political subdivision shall be eligible to vote in a primary for the election of such committee members from such political subdivision; provided no town committee

in any municipality shall be elected both at large and from political subdivisons.

Vetoed June 28, 1985. Veto sustained July 22, 1985.

VETO MESSAGE OF GOVERNOR
OF THE STATE OF CONNECTICUT
FOR P.A. 85-320, AN ACT
PERMITTING UNAFFILIATED VOTERS
TO VOTE IN CERTAIN PRIMARY ELECTIONS

I am returning herewith, without my approval, Senate Bill No. 5, Public Act 85-320, entitled, "An Act Permitting Unaffiliated Voters to Vote in Certain Primary Elections".

This bill would enable a state political party to adopt rules which would permit voters who are not members of that party to participate in a primary. Under current law, no person is allowed to vote in a party primary who is not enrolled as a member of that party.

However, under Connecticut's lenient registration law, any unaffiliated voter may vote in a party's primary simply by enrolling in that party up to the day before the primary.

Following Judge Cabranes' federal district court decision holding Connecticut's primary law unconstitutional, I said that, if this decision were allowed to stand, it would lead to the demise of the two-party system, because this bill could allow a voter, by remaining unaffiliated, to vote in either party's primaries, or perhaps, both parties' primaries. Party

registration would thus become a detriment.

In addition, this bill in unfair, because it fails to spell out that primaries for all elected offices should be open to participation by unaffiliated voters. It allows political parties to pick and choose which primaries are open to such participation, and allows the parties to change the eligible primaries when it becomes politically expedient to do so. If the parties were thus allowed to change their rules from election to election, this would create administrative chaos in the Office of the

Secretary of the State and the offices of Town Clerks.

Therefore, I do not approve Senate Bill No. 5, Public act No. 85-320.

Vetoed June 28, 1985. Veto sustained July 22, 1985.

Vol. III, State of Connecticut Public and Special Acts Jan. 1985 Reg. Sess., July 1985 Spec. Sess., p. 1386.

TYPES OF STATE PRIMARIES

According to the Book of the States (Council of State Governments, 1984), Table 9, 38 states have a "closed"

primary in which voters receive only the ballot of their party choice. Voters in these primaries must declare their party affiliation on or before the day of the primary election.

Nine states have an open primary in which voters receive a ballot for all parties and select the party of their choice in the voting booth.

Two states have a blanket primary in which voters are not restricted to one party but can vote for different offices among different parties. However, they may vote only once for each office.

Alabama by statute delegates to the parties who is eligible to vote in a primary, but requires party membership to participate.